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No. OFFICE OF THE CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1997

WILLIAM C. SARSFIELD, Former Chairman of the Board and Current Directory of Sequoia National Bank,

Petitioner,

v.

OFFICE OF THE COMPTROLLER OF THE CURRENCY,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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PETITION FOR WRIT OF CERTIORARI

A. Barry Cappello
CAPPELLO & McCANN LLP
831 State Street
Santa Barbara, California 93101
(805) 564-2444
Counsel for Petitioner
William C. Sarsfield

July 28, 1997

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QUESTIONS PRESENTED FOR REVIEW

1. Does the Office of the Comptroller of the Currency ("OCC") Final Decision and Order (hereinafter "OCC Decision") rejecting the Administrative Law Judge Shipe's Recommended Decision (hereinafter "ALJ Decision") deny petitioner due process and depart from the accepted and usual course of judicial proceedings?
2. Does due process require an Agency (i.e., the OCC) to halt its civil penalty proceeding and reevaluate its earlier orders of violation and conclusions thereon when it is unequivocally proven at trial that the evidence on which the agency based its orders of violation and its entire case was forged and fraudulent documents?
3. Does the substantial evidence standard comport with due process when the "substantial evidence" relied upon by the Agency as the basis for its orders of violation and conclusions thereon was forged and fraudulent documents which the agency itself admitted could not be relied upon?

LIST OF PARTIES TO THE PROCEEDING

The petitioner, William C. Sarsfield, was the petitioner below and petitioner in the Court of Appeals.

Respondent Office of the Comptroller of the Currency was the respondent below and the respondent in the Court of Appeals.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED FOR REVIEW	ii
LIST OF PARTIES TO THE PROCEEDING	iii
TABLE OF AUTHORITIES	v
CITATION OF THE REPORTS OF OPINIONS IN THE CASE	1, 2
STATEMENT OF THE BASIS FOR JURISDICTION	2
STATEMENT OF THE CASE	2
ARGUMENT	9
APPENDICES	1a-362a
Volume I of III	1a-105a
Volume II of III	106a-242a
Volume III of III	243a-362a

TABLE OF AUTHORITIES

Cases Page

Blackburn v. Martin, 982 F. 2d 125, 128 (4th Cir. 1992) 9

Evans v. Heckler, 734 F. 2d 1012, 1015 (4th Cir. 1984) 11

Nibali v. United States, 589 F. 2d 514, 516 (Ct. Claims 1978) 9

Transcon v. AT&T Technologies, Inc.
89 F.3d 559, 564 (9th Cir. 1996) 9

Statutes

12 U.S.C. § 1818(b) and (I) 2

12 U.S.C. § 1818(h)(ii) 2

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CITATION OF THE REPORTS OF OPINIONS IN THE CASE

The decision of the United States Court of Appeals is not appropriate for publication and may not be cited to or by the court of the Ninth Circuit except as provided by Ninth Circuit Rule 36-3.

The Memorandum of the District Court is reproduced in full in the Appendix.

STATEMENT OF THE BASIS FOR JURISDICTION

This is an appeal of a denial for petition for review of a decision of the United States Department of the Treasury which denial was entered on January 2, 1997, Appendix ("APP.") pp. 2a-5a, in the Ninth Circuit of the United States Court of Appeals. Petitioner's Petition for Rehearing was filed February 19, 1997 (APP. pp. 7a-21a) and Denied on February 28, 1997 (APP. p. 6a). The statutory basis of subject matter jurisdiction is 12 U.S.C. § 1818(b) and (I). The statutory basis for jurisdiction of the United States Appellate Court and Supreme Court is 12 U.S.C. § 1818(h)(ii).

STATEMENT OF THE CASE

The statutory basis for jurisdiction of the Ninth Circuit Court of Appeals is 12 U.S.C. § 1818(h)(ii). This was a civil money penalty proceeding by the OCC against petitioner William C. Sarsfield ("Petitioner" or "Sarsfield"). Petitioner was and is on the Board of Directors of Sequoia National Bank ("the Bank"). The Bank entered into a consent order ("Consent Order") with the OCC dated March 4, 1992. (APP. p. 327a (ER 10)[1].)

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[1] The citation "ER" followed by a number refers to the exhibit so numbered in the Petitioner's original Excerpts of Record filed concurrently with Petitioner's Opening Brief in the United States Court of Appeals for the Ninth Circuit.

On November 20, 1993, the OCC issued a Notice of Assessment of Civil Money Penalties ("Notice") against Petitioner and other board members of the Bank, alleging that these parties had "caused, brought about, participated in, counseled, or aided and abetted" the Bank's alleged failure to comply with Articles VI, VII, §§§IX, X, XII, XIII and XV of the Consent Order. The OCC concedes compliance with the other articles of the Consent Order. The Notice prayed for the issuance of a final Order of Assessment directing Petitioner to pay a civil money penalty ("CMP") in the amount of $15,000. (APP. pp. 268a-276a (ER 38).)

Petitioner filed an Answer (APP. pp. 262a-264a (ER 39)) and requested an administrative hearing. (APP. pp. 265a-267a (ER 40).) On June 7-10, 1994, the matter was heard by Administrative Law Judge ("ALJ") Arthur L. Shipe. On February 3, 1995, ALJ Shipe issued his Recommended Decision. Judge Shipe found no violations of Articles X or XV. Moreover, he found only "technical" violations of Articles VI, VII, IX, XII, and XIII.

Judge Shipe specifically found that Petitioner Sarsfield (and the rest of the Board) "... sincerely wanted to do that which was in the best interest of the Bank." (APP. p. 107a at p. 112a (ER 52).) Judge Shipe further found that the technical violations were not "... flagrant or intentional, for [in the courts] opinion the evidence demonstrates that substantial effort was undertaken to attempt compliance with the OCC mandates" (APP. p. 107a at p. 122a (ER 52).) Judge Shipe further referenced the "good faith of the Respondent (Sarsfield)" and described his substantial efforts to accomplish compliance with the Consent

Order. (APP. p. 107a at p. 123a (ER 52).)

At the June 1994 trial, evidence came out of the deep personal animosity that a minority faction on the Board (Directors Henning and Bolles) felt towards Petitioner and the efforts they took to distort and prejudice the OCC's view of the internal operations of the Bank. Indeed, the OCC itself admitted in its Prehearing Statement that the Henning/Bolles faction on the Bank's Board

> "... acted as a roadblock ... taking solace in their outsider status and refusing to work with the majority to alter the Bank's policies and practices ... .
> "[t]he minority group ... equated anything that was beneficial to the majority group as a detriment to the Bank. This simplistic mathematics ignores the reality that the primary duty of the minority group directors during the period of noncompliance was to attempt to achieve compliance with the Consent Order, not to attempt to thwart any initiative which might have the secondary effect of allowing the majority group to retain effective control of the Board." (APP. p. 218a at pp. 219a-221a (ER 41).)

Henning admitted that starting in 1991, he engaged in a campaign to "get rid of" Petitioner (APP. p. 222a at pp. 230a-231a (ER 47 at 797:15-19).), in which he "got in bed with" the OCC as far back as 1991 for that purpose (APP. p. 222a at pp. 230a-232a (ER 47 at

798:15-21).) Henning further admitted that he surreptitiously forged and submitted to the OCC (of course without the knowledge of Petitioner or the other members of the Board) false and misleading "reports" in OCC format to disguise their real source (APP. pp. 222a-229a (ER 47 at 784:3-789:14).), so that the OCC would adopt the information as true in the mistaken belief that it was receiving official reports from the Bank. In fact, the OCC submitted these very same forged documents (APP. pp. 277a-295a, 296a-320a, 321a-326a, 328a-329a, 330a-346a (ER 4; ER 3; ER 6; ER 24; and ER 34).) as the basis for the reports of examination, consent order and subsequent findings of non-compliance during the period 1991-1993. These forged documents contained outrageously bizarre statements and accusations about Petitioner and the management of the Bank which were untrue and not corroborated by any competent evidence.

The OCC nevertheless chose to believe all of this diatribe without once questioning Petitioner about it or even disclosing to him that they were receiving these bizarre forged "reports" ostensibly from the Bank. Thereafter, the OCC required the Bank to enter into the Consent Order on March 4, 1992. (APP. p. 327a (ER 10).) It also came out in Henning's trial testimony that at a meeting in August of 1992, the OCC had conceded that its real purpose behind the Consent Order was to force Mr. Sarsfield out of bank management. (APP. p. 222a at pp. 230a-232a (ER 47 at 797:20-798:19).) Despite ample opportunity to do so, the OCC never produced any witness willing to deny the accuracy of this testimony.

Petitioner Sarsfield worked long and hard after the March 4, 1992 Consent Order to ensure Bank compliance. Sarsfield reduced his salary 30 percent, and increased his hours to approximately 60 hours per week while he worked to ensure compliance. (APP. p. 244a at pp. 249a-250a (ER 45 at 296:9-23).) In accordance with the Consent Order, Sarsfield prepared and submitted to the OCC exhaustively-detailed monthly reports documenting the steps being taken by the Bank to comply with each and every Article of the Consent Order. At trial, Mr. Sander (the OCC examiner in charge of the 1991-1993 examinations of the Bank) admitted that there was never any occasion when he asked Petitioner for any information that he failed to give nor could he think of any example of ever asking Petitioner to do anything that he refused to do. (APP. p. 251a at 255a (ER 42 at p. 152:20-25).)

In August 1992, recognizing that the Henning/Bolles minority faction (which ironically comprised two-thirds of the Compliance Committee in charge of compliance) would continue to undermine the Bank's efforts at compliance with the Consent Order as long as he remained in office, Petitioner prepared a proposed "action plan" setting forth the direction the Bank should take to ensure continued compliance with the Consent Order. Petitioner further caused this "action plan" to be adopted by the Board, and then resigned from active participation in the management of the Bank. (APP. pp. 244a-248a (ER 45 at 290:7-293:12).) Within a few days, Petitioner was hospitalized, having lost approximately half his blood due to ruptured ulcers. (APP. p. 244a at p. 250a (ER 45 at 298:1-10).)

The OCC's other "star" witness (Bolles) admitted that the action plan submitted by Petitioner in August of 1992, if adequately implemented by subsequent management, would have responded to all of the remaining issues in the Consent Order. (APP. pp. 240a-242a (ER 46 at 831:3-832:20).)

Mr. Ragus (assistant to Mr. Sander) admitted that he was not dealing with Petitioner on compliance issues after August of 1992. (APP. pp. 259a at p. 260a (ER 43 at 233:5-8).) Mr. Sander admitted that Petitioner was "no longer involved in management after August 1992 (APP. p. 251a at pp. 257a-258a (ER 42 at 734:23-735:2).) and was not "involved with ... compliance with the Consent Order" after that period. (APP. p. 251a at p. 253a (ER 42 at 104:19-22).)

At trial, the OCC relied heavily on the testimony of Henning and Bolles, the minority faction. While the Notice had sought a CMP of $5,000 from each of these directors, just prior to trial the OCC agreed to reduce these CMP's to $950 each. These agreements were not signed in final until immediately after Henning and Bolles had cooperated and testified at trial, however. (APP. p. 222a at pp. 234a-237a (ER 47 at 803:7-806:3); and APP. p. 180a at p. 217a (ER 48).)

The OCC's complicity with Henning and Bolles as against Petitioner went far beyond the reduced CMP agreements in this proceeding. This was evidenced by the fact that the OCC sent Henning unredacted copies of OCC files, for him to use against Petitioner in a shareholder derivative suit filed by one bank shareholder as a result of the controversy generated by the Henning/Bolles/OCC campaign

against Petitioner. (APP. pp. 68a-82a (ER 53 at Exh. 1).) Providing these unredacted documents was contrary to both statute and agency directive.

After hearing Petitioner's evidence of this intentional sabotage by the Henning/Bolles faction, Judge Shipe agreed finding that "... Their fierce disagreement, however, which actually deteriorated to a level of personal hatred between some, unfortunately precluded the effective accomplishment" of the Board's objectives of compliance with the Consent Order and acting in the best interest of the Bank. (APP. 107a at p. 112a (ER 52).) Judge Shipe recommended that Petitioner be assessed a CMP of $10,000. (APP. p. 107a at p. 123a (ER 52).)

Both Petitioner and the OCC filed exceptions to the ALJ's decision. (APP. pp. 68a-82a and 83a-105a (ER 53, 54).) The OCC issued its final Decision and Order ("OCC Decision") dated July 21, 1995. The OCC rejected Judge Shipe's determination that there were no violations of Articles X and XV and adopted Judge Shipe's determination that violations of the other articles had occurred. The OCC Decision ordered Petitioner to pay a CMP in the amount of $10,000. (APP. pp. 41a-67a (ER 55).)[2]

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[2] Obviously, it is not the amount of the CMP that motivates petitioner in these proceedings, since his legal costs exceed both OCC's recommendation of $15,000 and Judge Shipe's recommendation of $10,000. Nor is it merely the "principle" of the matter. Rather, Petitioner's entire 35-year career, as well as his future livelihood and retirement, are at stake. The OCC, in collaboration with the Henning/Bolles faction has already successfully forced Petitioner out of

ARGUMENT

It was proven beyond any reasonable doubt at the June 1994 trial that the OCC's case was for all practical purposes punished entirely upon the forged and fraudulent "reports" surreptitiously prepared by Henning and submitted to the OCC. The OCC's steadfast refusal to recognize this fact and instead reject the ALJ Decision results in a denial of petitioners due process rights and significantly departs from the accepted and usual course of judicial proceedings. The agency knew at least by conclusion of the June 1994 trial that there was no substantial evidence to support most of its initial conclusions of non-compliance with the Consent Order. Notwithstanding this clear knowledge, the OCC abused its regulatory powers by rejecting the ALJ Decision and entering its own Decision which it knew to be erroneous and unsupported by any substantial evidence.

The record below demonstrated that there was no "substantial evidence" to support the agencies findings of fact. Substantial evidence means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. (Transcon v. AT&T Technologies, Inc., 89 F.3d 559, 564 (9th Cir. 1996); Fed. Carr. Cas. P. 84,018.)

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any active role in the Bank's management. If the unsupported, arbitrary and capricious findings in the OCC Decision are allowed to stand, Petitioner's ability to continue to earn his livelihood as a banking professor, as well as consultant and expert in banking operations, are seriously jeopardized. That is what is at stake in this proceeding, not just $10,000.

Substantiality of the evidence must take into account whatever in the record detracts from its weight. (Nibali v. United States, 589 F. 2d 514, 516 (Ct. Claims 1978); 218 Ct.Cl. 547; Blackburn v. Martin 982 F. 2d 125, 128 (4th Cir. 1992); 81 IER Cases 273.) This point of law is particularly critical to this case, since the OCC's decision is based almost entirely on the "statements" of Henning and Bolles. In his Reply Brief, Petitioner pointed out that the Excerpts of Record submitted by the OCC in support of the ROB relied heavily on draft "meeting notes" (i.e., statements) of Henning and/or Bolles. (See APP. p. 22a at p. 29a, *et seq.*)This is absolutely critical in determining the "substantiality" of the evidence supporting the OCC's findings, because the OCC has itself argued that ". . . Henning's uncorroborated statements cannot be relied upon." (APP. p. 41a at p. 63a (ER 55).) The OCC made this argument in attempting to diffuse the uncontroverted testimony by Henning in which he disclosed the OCC's admissions to him that the Consent Order of March 1992 was concocted by the OCC for the specific purpose of "getting rid of Sarsfield." Having judicially admitted that Henning's "statements" cannot be relied upon, the OCC cannot avoid the impact of this statement in light of the fact that OCC's entire case is itself premised almost exclusively on the "uncorroborated statements" of Henning. In other words, by admitting that Henning's "statements" are unreliable, the OCC is admitting that there is no substantial evidence supporting its

own case.[3]

A finding counter to uncontroverted evidence is not supported by substantial evidence. (Evans v. Heckler, 734 F. 2d 1012, 1015 (4th Cir. 1984); 5 Soc.Sec.Rep.Ser. 252.) The evidence at trial was uncontroverted that Henning/Bolles embarked on a personal vendetta against Petitioner starting in 1991 and used the OCC with its extraordinary regulatory powers to accomplish their purpose of getting rid of Sarsfield. More importantly, Henning's testimony at the trial in which he related the OCC's frank admissions to him that the March 1992 Consent Order was concocted specifically for the purpose of getting rid of Sarsfield went uncontroverted. Under the holding of the Evans case, this evidence is conclusive on both the OCC and this Court and mandates a finding that the OCC has proceeded in an arbitrary and capricious manner as far back as March of 1992. Moreover, Henning's uncontroverted testimony at trial disclosing the surreptitious preparation and presentation to the OCC of "reports" which were not official documents of the Bank or the Compliance Committee is likewise binding on the OCC and this Court. As a result, given the fact

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[3] It is also worthy of note that all of the written "reports" of Henning were erroneously admitted into evidence. Although Petitioner objected to them as hearsay at the June 1994 trial, they were admitted over these objections, presumably based on the "business records" exception to hearsay rule. However, Henning's subsequent testimony at the trial in which he admitted that these "reports" were surreptitiously prepared (i.e., "forged") and submitted to the OCC without the knowledge of the Bank, rendered the "business records" hearsay exception inapplicable since the "reports" obviously were not prepared "in the regular course of business" as required for that exception.

that the OCC's case was premised almost entirely on these "reports," it is uncontroverted that there is no "substantial evidence" to support the OCC's case. There is no evidence in the record to indicate that the OCC knew before the June 1994 trial that the "reports" which formed the basis for its conclusions of non-compliance with the Consent Order were in fact fraudulent and forged documents. However, it is beyond controversy that the OCC learned of this fatal defect in its case during that trial. Notwithstanding this knowledge, the OCC rejected in its entirety the Recommended Decision of the trial judge which took into account the lack of substantial evidence to support the OCC's case. Worse, the OCC then entered its own Decision which reiterated all of its pre-trial conclusions of non-compliance, without regard to the fact that it had been conclusively proven that the evidentiary basis for those conclusions was nothing more than forged and fraudulent surreptitious "reports" submitted by Henning/Bolles as part of their personal vendetta to force petitioner out of the banks management. By doing so, the OCC violated petitioners rights to due process and allowed itself to now knowingly participate in the personal vendetta by Henning/Bolles against petitioner. Such regulatory abuse and prosecutorial misconduct is a clear violation of petitioner's due process rights as well as a clear departure from the accepted and usual course of judicial proceedings, which has now been sanctioned by the Appellate Court, which

mandates this Courts exercise of its supervisory powers to avoid such abuses.

Dated: July 28, 1997

Respectfully submitted,

/s/ A. Barry Cappello
CAPPELLO & McCANN LLP
831 State Street
Santa Barbara, California 93101
(805) 564-2444
Counsel for Petitioner
William C. Sarsfield